

**FILED BY CLERK**

**FEB 25 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0257-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
RICHARD PAUL MIGUEL,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071256

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Robert J. Hirsh, Pima County Public Defender  
By Michael J. Miller

Tucson  
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Richard Miguel pled guilty to armed robbery, aggravated assault with a deadly weapon, and fleeing from a law enforcement vehicle. The trial court sentenced

him to concurrent prison terms, the longest of which was 12.5 years. In his petition for review, Miguel contends the court erred in denying his petition for post-conviction relief, in which he alleged the factual basis supporting his plea to armed robbery was insufficient and requested his conviction for that offense be vacated. We review the trial court's decision whether to grant post-conviction relief for an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review of Miguel's petition, but for the reasons stated below, deny relief.

¶2 On March 22, 2007, Amber A. and Brian L. had driven back to Brian's house, where Amber had parked her vehicle. As they approached, they noticed the vehicle's dome light was on and someone was inside. When they pulled up to the vehicle, a man, Miguel, got out and reached in the passenger-side window of Brian's car, where Amber was sitting. Miguel threatened to stab Brian and told the couple to "leave your keys." Brian got out of the car and walked toward its passenger side, but Miguel chased him away. Miguel then drove off in Amber's vehicle.

¶3 A short time later, Tucson police officers located Miguel driving south on Kolb Road. He led officers on a six-mile chase, which ended when he flipped the car. Both victims identified Miguel as their assailant. He was charged with third-degree burglary, armed robbery, two counts of aggravated assault with a deadly weapon, criminal damage, and fleeing from a law enforcement vehicle. Pursuant to a plea agreement, Miguel was convicted of armed robbery, one count of aggravated assault, and fleeing from a law enforcement vehicle. The trial court sentenced him to an enhanced, slightly aggravated prison term of 12.5 years for armed robbery, to run concurrently with

enhanced, presumptive prison terms of 6.5 and 2.25 years for aggravated assault and fleeing from law enforcement, respectively.

¶4 Miguel filed an “of-right” petition for post-conviction relief pursuant to Rule 32.1, Ariz. R. Crim. P., in which he argued an insufficient factual basis supported his admission to armed robbery. In particular, he asserted there was no evidence that he had threatened the victims “with intent either to coerce surrender of property or to prevent resistance to [his] taking or retaining property” or that he had taken the property from their “immediate presence,” both of which are elements of robbery. *See* A.R.S. § 13-1902(A). After an evidentiary hearing at which the trial court heard arguments from counsel and considered the information presented at the change-of-plea hearing, including the transcript of the grand jury proceedings, the court denied relief. The court found that “the record in this case does not conclusively demonstrate that [he] had taken possession of [Amber’s] vehicle before she arrived.” And it concluded Miguel had “relinquished control when he exited the vehicle to threaten [Amber] and [Brian]” and the robbery had occurred within Amber’s immediate presence because it was in her plain sight.

¶5 In his petition for review, Miguel similarly argues the factual basis supporting his guilty plea to armed robbery was insufficient to establish that he committed the offense. He contends “the evidence did not support the [trial court’s] finding that the victims were in the immediate presence of [Amber’s] vehicle” in the course of his taking it, “as required by the robbery statute.” And, he maintains “[i]mmediate presence must involve a real opportunity to interfere with the taking” of the

property and “[t]here was no evidence the victims in the present case had a real opportunity to interfere.”

¶6 “Before entering judgment on a guilty plea, the trial court must determine whether a factual basis exists for each element of the crime to which defendant pleads.” *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994), *citing* Ariz. R. Crim. P. 17.3. “A factual basis can be established by ‘strong evidence’ of guilt and does not require a finding of guilt beyond a reasonable doubt.” *Id.*, *quoting* *State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986).

¶7 A person commits armed robbery if, “in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property” and the person is armed with or threatens to use a deadly weapon or dangerous instrument. A.R.S. §§ 13-1902, 13-1904. Miguel correctly asserts that “immediate presence” is not defined in either the robbery statute or Arizona case law. However, according to “[t]he generally accepted definition of immediate presence[,] . . . ‘[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not [for the threat or use of force] . . . , retain his possession of it.” *People v. Hayes*, 802 P.2d 376, 406-07 (Cal. 1990) (citing cases), *quoting* *Commonwealth v. Homer*, 127 N.E. 517, 533 (Mass. 1920) (last alteration added, other alterations in *Hayes*).

¶8 Here, there was evidence that, upon seeing Amber’s car occupied and the dome light illuminated, Brian and Amber “pull[ed] up to [Amber’s] car,” suggesting that the two cars were in close proximity. This is sufficient evidence that Amber’s vehicle was within her “reach, inspection, observation or control” and thus within her “immediate presence” while Miguel was in the process of taking it. *Id.* Furthermore, contrary to Miguel’s assertion, there is no evidence in the record to suggest he could have immediately driven away in the car, which, in any event, he did not do. When the victims pulled up, Miguel got out of the vehicle, threatened them with a knife, told them to leave the car keys, and chased them away. Thus, even assuming he simply could have driven away, there was “strong evidence” that Miguel used force in order to take the vehicle or prevent Amber and Brian from attempting to resist or regain control over it. *Salinas*, 181 Ariz. at 106, 887 P.2d at 987. The trial court did not abuse its discretion in denying post-conviction relief.

¶9 For the reasons stated above, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

